

ARKANSAS SUPREME COURT

No. CR 07-259

HENRY SIMON VIDAL
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered February 7, 2008

APPELLEE'S MOTION TO DISMISS
APPEAL; APPELLANT'S PRO SE
MOTIONS TO STAY APPEAL AND TO
RELIEVE COUNSEL [CIRCUIT
COURT OF CRAWFORD COUNTY,
CR 2005-42, HON. MICHAEL
MEDLOCK, JUDGE]

APPELLEE'S MOTION TO DISMISS
APPEAL GRANTED; APPELLANT'S
PRO SE MOTIONS TO STAY APPEAL
AND RELIEVE COUNSEL MOOT.

PER CURIAM

In 2006, appellant Henry Simon Vidal entered a plea of guilty to possession of cocaine with intent to deliver. He was sentenced to 240 months' imprisonment and received an additional 240 months' suspended imposition of sentence. Appellant entered his plea on May 16, 2006, and the judgment was entered on May 26, 2006.

Subsequently, on June 26, 2006, appellant filed in the trial court a motion to vacate his plea of guilty based on ineffective assistance of counsel pursuant to Ark. R. Crim. P. 26.1. The trial court treated the motion as a petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1, and at a hearing on the petition, the trial court denied postconviction relief. Appellant filed a notice of appeal from the trial court's ruling at the hearing, and then later filed two petitions for postconviction relief under Rule 37.1. The trial court entered an order on January 19, 2007, that denied all three petitions. We then granted a belated appeal to this court from the final order. *Vidal v. State*, 369 Ark. 424, ____

S.W.3d ____ (2007) (per curiam).

Now before us are appellant's pro se motions to relieve the attorney who is representing him in this appeal and to stay the appeal so that he may file pro se points for consideration by this court. Also before us is appellee's motion to dismiss the appeal. Prior to filing these motions, the matter had been fully briefed by both parties.

As appellant could not be successful on appeal, the appeal is dismissed and appellant's motions are moot. An appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (per curiam).

Here, appellant's motion to withdraw his plea of guilty under Rule 26.1(a) was not timely filed because it was filed after the judgment had been entered. *Webb v. State*, 365 Ark. 22, 223 S.W.3d 796 (2006). Under these circumstances, we have held that such a motion is properly treated as a petition for postconviction relief pursuant to Rule 37.1. *Webb, supra*; *McCuen v. State*, 328 Ark. 46, 941 S.W.2d 397 (1997). However, the record indicated that at the time the pleading was filed, appellant was not in custody as required by Rule 37.1(a) in that he was free on bond. Therefore, the trial court was unable to consider the matters addressed in the pleading under either Rule 26.1 or Rule 37.1.

After he was placed in custody, appellant filed two pleadings captioned as Rule 37.1 petitions on October 23, 2006, and January 16, 2007. The petitions were filed more than ninety days after entry of the judgment. Criminal Procedure Rule 37.2(c) states that a Rule 37.1 petition must be filed within ninety days from entry of the judgment if a criminal defendant enters a plea of guilty. The

filing deadlines imposed by this section are jurisdictional in nature, and if they are not met, a trial court lacks jurisdiction to consider a Rule 37.1 petition. *Maxwell v. State*, 298 Ark. 329, 767 S.W.2d 303 (1989). Therefore, the trial court had no jurisdiction to consider either petition.

Appellee's motion to dismiss granted; appellant's pro se motions to stay appeal and to relieve counsel moot.